

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1260

To be argued by
GREGORY L. DISKANT

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1260

UNITED STATES OF AMERICA,

Appellee,

—v.—

MICHAEL MOULTRIE, a/k/a "MIDNIGHT,"

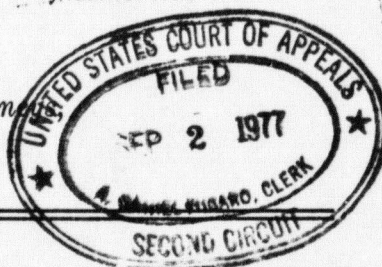
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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**United States Court of Appeals
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—v.—

MICHAEL MOULTRIE, a/k/a "Midnight,"

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Michael Moultrie appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on June 1, 1977, after a three day trial before the Honorable Dudley B. Bonsal, United States District Judge, and a jury.

Indictment 76 Cr. 1003, filed on October 29, 1976, charged Michael Moultrie, a/k/a "Midnight," with one count of possessing stolen mail in violation of Title 18, United States Code, Section 1708. A superseding indictment was filed on December 6, 1976, adding two more counts of possession of stolen mail, and another superseding indictment was filed on February 9, 1977, re-numbering the counts so as to charge a total of thirty-two counts of possession of stolen mail.

A suppression hearing was held on February 15, 1977, on the defendant's motion to suppress certain physical evidence and statements taken from him on September 1, 1976. On February 28, 1977, Judge Bonsal filed a memorandum opinion denying the motion to suppress.

On March 30, 1977 a hearing pursuant to *United States v. Wade*, 388 U.S. 218 (1967), and its progeny was held. At the conclusion of the hearing, Judge Bonsal denied Moultrie's motion to suppress his identification. Immediately thereafter the case was tried before Judge Bonsal and a jury. The trial ended on April 1, 1977, when the jury found Moultrie guilty on the twenty-nine counts that had been tried.*

On June 1, 1977, Judge Bonsal sentenced Michael Moultrie to eighteen months imprisonment on all twenty-nine counts, the sentences to run concurrently.

Statement of Facts

A. The Suppression Hearing

Prior to trial, the District Court conducted a hearing on Moultrie's claim that evidence seized from him at the time of his arrest on an unrelated rape complaint, and statements made thereafter, should be suppressed. The testimony at the suppression hearing revealed the following.

On September 1, 1976, John Ciaravino and his wife presented themselves at the 120th Precinct police station

* Prior to trial, the Government announced that it was not prepared to try Counts 2, 3 and 5 of the indictment and submitted a redacted indictment that omitted those counts. The jury found Moultrie guilty on all twenty-nine counts that were submitted to it. Counts 2, 3 and 5 were dismissed at the time of sentence.

on Staten Island. Mr. Ciaravino told Officers John Feis and Cornelius O'Reilly that his wife had been raped three days earlier by two men and that the men were at that moment in a nearby park. The officers then spoke with Mrs. Ciaravino, who was seated outside the precinct house in the couple's automobile. She confirmed her husband's statement of events. (S. Tr. 3-4; App. 21-22).*

Recognizing the urgency of locating the two accused rapists while they were still in the park (S. Tr. 16; App. 34), the officers immediately entered a police car, instructing Mr. and Mrs. Ciaravino to follow in their automobile, and drove to the park. (S. Tr. 4; App. 22).

At the park, Officer Feis asked Mrs. Ciaravino if she could identify the two rapists and she pointed to two men. One was sitting on a bench and the other, defendant Moultrie, was standing talking with a woman. Feis and O'Reilly approached the two men and explained to them that Mrs. Ciaravino had said that she had been raped a few days before and that she had accused them of the crime. The officers then took the two men back to their patrol car where Mrs. Ciaravino was waiting. (S. Tr. 4-5; App. 22-23).

As the officers took the two men to the patrol car, Officer O'Reilly patted the jacket Moultrie was carrying. He felt and removed thirty-four authorizations to purchase food stamp coupons. ("ATP's") (S.Tr. 20-23; App. 38-41).

At the patrol car, Officer Feis asked Mrs. Ciaravino again whether the two men were the men who had raped

* The designation "S.Tr." refers to the transcript of the suppression hearing held on February 15, 1977; the designation "Tr." refers to the transcript of the trial; the designation "GX" refers to Government exhibits introduced at trial; the designation "Br." refers to the appellant's brief on appeal; the designation "App." refers to the appellant's appendix.

her. She said they were, and the two men were placed under arrest. (S.Tr. 5; App. 23).

Further examination of Mr. and Mrs. Ciaravino at the precinct house revealed that Mrs. Ciaravino was an out-patient at a psychiatric hospital and that her complaint was unfounded. The officers voided the arrest. (S.Tr. 7, 11; App. 25, 29).

After the hearing, Judge Bonsal denied Moultrie's suppression motion in a written memorandum opinion. (App. 17). He found that the arresting officers had probable cause to arrest Moultrie on the rape complaint, and that the thirty-four ATP's were seized incident to that arrest. Thus, the ATP's, which formed the basis for Counts 3 through 29, were admitted into evidence, as was the testimony of Postal Inspector Robert Yost, who interviewed Moultrie shortly after his arrest on September 1, 1976, about the ATP's.

B. The Government's Case at Trial

In August 1976, Angel Rodriguez, a United States Postal Service employee stationed at the Boulevard Station Post Office in the Bronx, observed certain suspicious behavior by a co-worker, Michael Moultrie. On repeated occasions he observed Moultrie thumbing through trays of mail intended to be returned to senders from New York City. These particular trays, according to Rodriguez, who worked in the unit that handled return mail, contained a high percentage—up to 50 percent—of “welfare items”, namely, welfare checks, medicaid cards, and authorizations to purchase food stamp coupons. (Tr. 206-13).

On several occasions, Rodriguez questioned Moultrie about his activity. Once Moultrie told Rodriguez he was looking for a letter for his girlfriend; once he told him he was doing “nothing.” On a third occasion Rodriguez observed Moultrie with what appeared to be three or four

ATP's in his back pocket. He asked Moultrie what he was doing, and Moultrie told him to mind his own business. Rodriguez pressed further and asked Moultrie what he was going to do with the ATP's. Moultrie told Rodriguez he knew some people who could give him money for them. (Tr. 213-18).

Also in August 1976, Michael Moultrie met a man named Jimmy "J.C." Bennett in Harlem.* He told Bennett his name was "Tony" and that he had some checks that he wanted to sell. After a brief discussion, in which Bennett indicated that he knew someone who would buy checks, Moultrie gave Bennett seven unendorsed welfare checks, with instructions that he wanted one-half of the face value of the checks. (Tr. 24-27).

Bennett took the checks to Jones L. Parker, who ran a real estate office at 148th Street and Seventh Avenue in New York City. Parker offered Bennett only one-third of the face value of the checks. When this information was relayed back to Moultrie, he reluctantly accepted the terms; but when payment was not forthcoming after several days, he demanded to meet with Parker himself. (Tr. 27-29, 31-32).

Moultrie and Bennett went to Parker's office, where Parker produced partial payment for the checks he had already received. According to Bennett, Moultrie told Parker he could obtain \$1,500 worth of checks for him, and Parker expressed interest in doing further business. (Tr. 32-34). On one occasion thereafter Bennett observed Moultrie entering Parker's office on his own. (Tr. 36).

Parker had a partner named Harold Borden, and in early August 1976, Borden employed a receptionist named

* Bennett testified at trial pursuant to a cooperation agreement with the Government. Prior to trial he pleaded guilty to a one count indictment charging him with possession of stolen mail and received a sentence of probation. (Tr. 19-21, 72).

Alexander Dantzler. Dantzler only worked for Borden for two weeks, until August 20, 1976, but during that two-week period he frequently observed Moultrie and Bennett, alone and together, enter the real estate office. They always asked to speak with Parker. Dantzler knew Moultrie as "Midnight." (Tr. 82-87).

On August 20, 1976, Moultrie and Bennett came in twice looking for Parker. On the second occasion, late in the afternoon, Harold Borden was in the office. Moultrie and Bennett spoke with Borden in Dantzler's presence. Dantzler observed the three step out into a corridor and return, at which time Bennett left the office. Shortly thereafter, Dantzler observed Moultrie remove an envelope from his waist area and hand it to Borden. Borden and Moultrie re-entered the corridor and, when they returned, Borden was carrying four welfare checks. Borden put the checks down on the corner of Dantzler's desk and Moultrie departed. Dantzler could see two of the checks; one was payable to "Luz Ramos" and the other to someone named "Acosta." (Tr. 87-94).

Soon after Moultrie departed, Parker returned and moments later agents of the United States Postal Inspector Service and the Secret Service raided the real estate office. Postal Inspector Robert Hazelwood observed Harold Borden drop four welfare checks to the floor. (GX 4-7). One of the checks was payable to "Luz Ramos" (GX 4) and another was payable to "Eunice Acosta." (GX 5). Upon laboratory examination, both checks were found to bear the fingerprints of Michael Moultrie. All four checks had been placed in the mail (GX 52) and, according to their addresses, should have been routed through the Boulevard Station Post Office, where Moultrie worked. The "Luz Ramos" check, the Government proved, had never been received by Luz Ramos nor had it been returned, as it should have been, to the New York City Department of Social Services. (Tr. 96, 124-26, 138, 175-76, 191, 244-51).

On the evening of August 24, 1976, Bennett met again with Michael Moultrie. Moultrie gave him three more unendorsed welfare checks. The next day, on the morning of August 25, 1976, Bennett took the checks to Parker's office. Parker and another man unknown to Bennett, who was in fact an undercover agent of the Postal Service, went with Bennett to a bank to cash the checks. At the bank Bennett was arrested by Inspector Hazelwood with the three checks he had received from Moultrie in his possession. All three checks had been placed in the mail (GX 52) and, according to their addresses, should have been routed through the Boulevard Station Post Office, where Moultrie worked. One of the checks was payable to Providencia Cruz. (GX 2). Cruz had never received that check. (Tr. 36-39, 127-29, 191, 236-44).

Michael Moultrie was arrested by Officer Cornelius O'Reilly of the New York City Police on September 1, 1976. At the time of his arrest, he had in his possession 34 authorizations to purchase food stamp coupons. (GX 8-41). Seven of the ATP's were not in their envelopes; the remaining 27 were in envelopes, but the envelopes had been opened. The ATP's had all been placed in the mail on or about August 30, 1976 (GX 51), and, according to their addresses, all should have passed through the Boulevard Station Post Office, where Moultrie worked. (Tr. 157-61, 170-71, 191).

Moultrie was interviewed by Postal Inspector Robert Yost on the day of his arrest. He told Yost that he had been stamping pieces of mail to be returned to their senders on the previous day and had removed the ATP's accidentally from the Post Office. He claimed that he had left the Post Office with an Ebony magazine and that, after leaving, he had opened the magazine and discovered the 34 ATP's. Moultrie admitted opening all the ATP's and removing 7 from their envelopes. He could not explain why he had opened the envelopes. Thereafter, Moul-

trie wrote out and swore to a statement encompassing his version of events. (GX 43). (Tr. 163-75).

C. The Defense Case

Michael Moultrie did not call any witnesses or testify on his own behalf.

D. The Summations

The Government's direct summation was almost entirely devoted to a review of the evidence against Moultrie. (Tr. 267-76). As was his duty, the prosecutor presented the Government's view of the evidence, but carefully explained that it would be the jurors' recollection of the evidence, and their evaluation of it, that controlled. (Tr. 267). Thus, he typically qualified the inferences he asked the jurors to draw—and reminded the jurors of their duty—by noting that they were inferences “you can find from the evidence.” (See, e.g., Tr. 270, 272, 273, 274, 275).

The defense summation attempted to cast doubt on the credibility of the Government witnesses, particularly the accomplice witness Bennett, whom defense counsel described as “from the bottom of the barrel” (Tr. 284), as one who “would name his grandmother in order to get a break,” (Tr. 284), and, sarcastically, as “this very honorable individual,” (Tr. 280), and “the man with that fabulous memory.” (Tr. 283). See also Tr. 283 (Dantzler); Tr. 285-86 (Rodriguez).

Defense counsel next accused the Government of falsely manufacturing a case against his client. Relying on the fact that Bennett knew Moultrie as “Tony” and Dantzler knew him as “Midnight,” defense counsel argued:

"So what does the government do? The government says, well, listen, we got two names. Instead of one name we will give him two names, because when you hear an alias, you think of somebody who is very devious, you see. . . . So instead of calling him Midnight, we will call him Tony, we will call him Midnight, what difference does it make? *I am going to get this guy. I am going to give names.*" (Tr. 280) (emphasis added).

Defense counsel explained the Government's decision to prosecute Moultrie in this way:

"Now, you see they can't find this fellow Tony. Nobody could find Tony. Tony suddenly doesn't exist. But, when the government sends these checks to Washington, they also send the fingerprint record of Mr. Moultrie to Washington. . . . [The fingerprint expert] is able to match that print [found on two of the checks] with Moultrie. Okay. *So we have a pigeon now.*" (Tr. 281-82) (emphasis added).

Finally, without any factual basis, defense counsel implied that the Government had suborned perjury by coaching the witnesses to identify Moultrie in court as the black man sitting at the defense table:

"Don't you think that [Bennett and Dantzler] knew when they came into court that Moultrie was going to be sitting at the counsel table with me? Maybe if I was black, there would be a problem in identifying, maybe, maybe. There was no question that he is the man sitting there. I am white he is black. How can you mistake that? *They said to him, defendant's going to be sitting at the counsel table.* So don't be impressed by that, when a witness gets up there. . . . Don't believe that nonsense." (Tr. 283-84) (emphasis added).

The Government's brief rebuttal summation ignored defense counsel's various charges of prosecutorial misconduct, and concentrated instead on rehabilitating the credibility of the government witnesses. (Tr. 287-91; App. 46-50). The prosecutor argued that Dantzler and Rodriguez were both ordinary citizens, eyewitnesses to crime but not participants themselves, who could have no conceivable motive for perjuring themselves. (Tr. 288-89; App. 47-48). He pointed out that while Bennett was an admitted participant in the crimes charged and had cooperated with the Government in order to benefit from that cooperation, Bennett had already been sentenced for his crimes and therefore stood to gain nothing from his testimony at Moultrie's trial.* (Tr. 290; App. 49). The prosecutor also stressed the absurdity of Moultrie's exculpatory statement to Inspector Yost and the strength of the fingerprint evidence.** (Tr. 289-290; App. 48-49). He concluded by reminding the jurors of their duty to base their verdict on the evidence and submitted the Government's position: that the evidence showed the defendant guilty beyond a reasonable doubt.***

After the summation was over, defense counsel made a vague, general objection to it. When pressed to give a reason for the objection, he stated only that he believed the prosecutor "was bolstering some of his client's [*sic*] testimony." (Tr. 292; App. 51).

* "What motive does Bennett have to lie? He's already been sentenced. He's not getting anything from us any more." (Tr. 290; App. 49).

** "[W]e submit that the fingerprint evidence is devastating." (Tr. 290; App. 49).

*** "Ladies and gentlemen, there is no more solemn duty, and it is not a pleasant duty, sitting in judgment on a fellow citizen. That is your duty. You were sworn, and you took an oath as jurors, to apply the evidence, the facts, the law as the Judge gives you, to render an honest verdict.

"We submit the only way to apply this evidence, these facts, this case, is to find Michael Moultrie guilty of the crimes charged beyond a reasonable doubt.

"Thank you for your attention." (Tr. 291; App. 50).

ARGUMENT

POINT I

Moultrie's Arrest Was Based On Probable Cause.

Moultrie seeks a reversal of his conviction on the ground that there was no probable cause for his arrest on September 1, 1976 on the charge of rape, and that therefore the 34 ATP's found in his possession at the time of arrest, and his subsequent statements to Postal Inspector Yost, were inadmissible at trial.* The basis for this contention is Moultrie's claim that the police improperly relied on the complaint of Mrs. Ciaravino that she had been raped and that Moultrie was one of the two men who had raped her. This claim is ill-founded; the police reliance was justified.

Moultrie concedes, as he must, that unlike information received from a professional informant, the police may act upon information received from a victim of, eyewitness to, or participant in, a crime without a show-

* It is important to emphasize what this appeal is *not* about.

Moultrie concedes that if there was probable cause for his arrest, the seizure of the ATP's was the result of a lawful search incident to arrest. Br. 23. See *United States v. Edwards*, 415 U.S. 800 (1974); *United States v. Robinson*, 414 U.S. 218 (1973); *United States v. Edmonds*, 535 F.2d 714 (2d Cir. 1976).

In addition, Moultrie concedes that "the time of formal arrest" does not control the legality of a search incident to that arrest. Br. 23. See *United States v. Jenkins*, 496 F.2d 57, 73 (2d Cir. 1974), *cert. denied*, 420 U.S. 925 (1975). Nor does Moultrie appear to quarrel with the established law that the fact that the information provided by the complaining witnesses was in fact false is irrelevant, if the police in "good faith" relied on their information to establish probable cause. *Hill v. California*, 401 U.S. 797, 803-05 (1971); *United States v. DeLeon*, Dkt. No. 77-1211, slip op. 5267, 5270-5271 (2d Cir., August 12, 1977); *United States v. Rosario*, 543 F.2d 6, 8 & n. 4 (2d Cir. 1976).

ing of reliability of the witness or his information. *United States v. Rueda*, 549 F.2d 865, 869 (2d Cir. 1977); *United States v. Anderson*, 533 F.2d 1210, 1213 (D.C. Cir. 1976); *United States v. Rollins*, 522 F.2d 160, 164 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976); *United States v. Burke*, 517 F.2d 377, 380 (2d Cir. 1975); *United States v. Miley*, 513 F.2d 1191, 1204 (2d Cir.), *cert. denied*, 423 U.S. 842 (1975). See Br. 18-19. Cf. *Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964). See also *United States v. DiStefano*, 555 F.2d 1094, 1100-1101 (2d Cir. 1977); *United States v. DeLeon*, Dkt. No. 77-1211, slip op. 5267, 5270 (2d Cir., Aug. 12, 1977). Any other rule would effectively bar the police from acting on the information of such persons, "despite the peculiar likelihood of its accuracy." *United States v. Miley*, *supra*, 513 F.2d at 1204.

That being the case, the existence of probable cause here follows immediately, Moultrie's attempts to distinguish the cases notwithstanding.*

* Moultrie distinguishes the cases by claiming that, unlike this case, the informants' statements were corroborated in the cases cited and that, generally, the facts called for immediate action. Br. 20. Here, of course, immediate action was also necessary; delay could have meant the disappearance of the accused rapists. As the Eighth Circuit has recently noted in a case where a victim's uncorroborated report was found sufficient to support the arrest of the defendant, "the police officers must make a judgment and act with dispatch." *United States v. Easter*, 552 F.2d 230, 233 (8th Cir. 1977).

While the informants' statements were in fact corroborated in most of the cases cited, but see *United States v. Easter*, *supra*, in no case was the fact of corroboration made a ground of decision. Rather, the reliability of the information was presumed from the fact that the informant claimed direct personal knowledge of the crime, which is altogether "removed from a 'meager report' that 'could easily have been obtained from an offhand

[Footnote continued on following page]

"[P]robable cause is established where (a) the victim of an offense (1) communicates to the arresting officer information affording credible ground for believing that the offense was committed and (2) unequivocally identifies the accused as the perpetrator, and (b) materially impeaching circumstances are lacking." *Pendergast v. United States*, 416 F.2d 776, 785 (D.C. Cir.), *cert. denied*, 395 U.S. 926 (1969) (footnote omitted).

See also *United States v. Anderson*, *supra*.

In this case, the test is readily met. Mrs. Ciaravino's statement that she had been raped, given the absence

remark heard at a neighborhood bar', as to which prior history of providing accurate information is required." *United States v. Miley*, *supra*, 513 F.2d at 1204, quoting *Spinelli v. United States*, *supra*, 393 U.S. at 417. See also *United States v. Burke*, *supra*, 517 F.2d at 381.

In any event, there was corroboration here, if only in "innocent aspects of the story." *United States v. Sultan*, 463 F.2d 1066, 1069 (2d Cir. 1972). Of course, such corroboration is sufficient even with untested anonymous informants. *Ibid*; see also *United States v. Rollins*, *supra*, 522 F.2d at 164-165; *United States v. Tuley*, 546 F.2d 1264, 1268 (5th Cir. 1977). In this case, there were two men in the park, just as Mrs. Ciaravino had said, and, significantly, she was willing to confront them. See *Nelson v. Moore*, 470 F.2d 1192, 1197 (1st Cir. 1972), *cert. denied*, 412 U.S. 951 (1973). Moreover, her story was repeated, and implicitly vouched for, by her husband. This tended to suggest the absence of the very impeaching evidence that was later found to exist—that Mrs. Ciaravino was a mentally unstable person whose accusations could not be trusted. Whether or not such corroboration would be sufficient had Mrs. Ciaravino been an untested professional informant, if corroboration is necessary at all when the information comes from the victim of a crime and the circumstances are exigent, such basic corroboration should surely be sufficient.

of any impeaching information and the urgency of the situation presented, was an ample basis for concluding that the crime had been committed. Her identification of Moultrie as the perpetrator, both at a distance and at close range, could hardly have been more unequivocal. Compare *United States v. DeLeon, supra*, slip op. at 5270. Of course, it turned out that Mrs. Ciaravino was lying. But such a risk is inherent in any system allowing, as it must, that arrests may be based on something less than a full trial of the existence of probable cause. Cf. *United States v. Burke, supra*, 517 F.2d at 381.*

Moultrie attempts to belittle the probable cause present here (1) by suggesting a stiffer standard for evaluating charges pressed by victims of crime; and (2) by second-guessing the police officers' response to Mrs. Ciaravino's charges. Neither attempt is persuasive.

Moultrie suggests that the complaints of victims of crime be viewed with more suspicion than the reports of eyewitnesses because "an alleged victim would be more involved and interested than a mere witness and,

* The strength of the probable cause present in this case can be viewed in another way. Probable cause to arrest requires only that the arresting officer have knowledge of facts "sufficient to warrant a prudent man in believing" that an offense is being or has been committed and that the defendant is the perpetrator. *Beck v. Ohio*, 379 U.S. 89, 91 (1964). Probable cause does not require the arresting officer to know facts sufficient to prove guilt at trial. *Draper v. United States*, 358 U.S. 307, 311-12 (1959); *United States v. Rodriguez*, 532 F.2d 834, 838 (2d Cir. 1976). Under New York State law, however, Moultrie could have been convicted of rape on the uncorroborated testimony—if believed—of Mrs. Ciaravino alone. N.Y. Penal Law §§ 130.16, 130.25 (McKinney's 1975). Accordingly, the police officers, having received Mrs. Ciaravino's averment that she had been raped by Moultrie, knew sufficient facts, as a matter of law, to take her charge of rape to a jury. *A fortiori*, they knew sufficient facts to make an arrest.

perhaps, have an ulterior motive making him less reliable." Br. 19. He ignores the equal treatment also provided to information supplied by accomplices in crime, *United States v. Rueda, supra*; *United States v. Miley, supra*, perhaps, of the three categories, that whose members are most interested and have the greatest motive to lie.*

Moreover, Moultrie's comparison makes little sense. If no crime was committed and the informant simply wished falsely to implicate a third party, there is no particular reason to assume that the informant would falsely cast himself in the role of victim rather than eyewitness. Accordingly, there is no reason, on this hypothetical, to downplay the word of a victim as against that of an eyewitness. If, on the other hand, a crime was committed, there is *less* reason to assume the victim would falsely accuse another of the crime than there is to assume that an eyewitness would lie.** Thus, Moultrie is correct that the victim is an interested and motivated party, but the only interest and motive it is rational to ascribe to the victim is a desire to apprehend the criminal, rather than to falsely implicate an innocent person. Accordingly, there is no reason to treat the information presented by persons who claim to be victims of crime with more suspicion than the information presented by eyewitnesses to, and accomplices in, crime.

Likewise, on the facts of this case, it is baseless to suggest alternative modes of conduct for the arresting officers. The officers were approached with information

* Despite the arguably greater motive to lie in the case of accomplices, this Court refused to apply a stiffer standard to an accomplice's information in *United States v. Rueda, supra*, 549 F.2d at 869-870, rejecting an argument much like that made by Moultrie here.

** There is, of course, no particular reason to doubt the word of the eyewitness either. See, e.g., *United States v. Sultan, supra*.

that accused rapists were *at that moment* in a nearby park. Obviously, the situation was exigent. Delay could mean the disappearance of the accused rapists. The only proper response was to go to the park. Asking for a description of the rapists was a pointless waste of time, since the complainant claimed she could point them out in the park.*

Accordingly, under settled principles the information of the victim provided probable cause for Moultrie's arrest,** and the ATP's and Moultrie's statement to Inspector Yost were properly admissible at trial.***

* The fact that in the heat of the chase neither officer thought to ride in the same car as the complainant and so to obtain additional details from her can hardly form a basis for undercutting the probable cause that already existed, or for Moultrie's spurious suggestion of police bad faith. Br. 23-24. While further questioning revealed impeaching material that led the police—properly—to vacate the arrest, at the time of the arrest the police had sufficient information on which reasonably to act, and no reason to suspect the falsity of the information.

** Should the Court conclude otherwise, the discovery of the ATP's is also sustainable as the product of a "stop and frisk." Surely Mrs. Ciaravino's information provided the basis for a reasonable suspicion that Moultrie had committed a crime, justifying an investigative stop. *Adams v. Williams*, 407 U.S. 143 (1972). Rape being a violent crime, the officers were likewise justified in patting down Moultrie's jacket and removing the bulky object felt therein—the package of ATP's. *Terry v. Ohio*, 392 U.S. 1 (1968). If the discovery of the ATP's was permissible, then Moultrie's subsequent arrest for their possession was proper and his statements to Inspector Yost admissible.

*** Even if this Court should conclude that the ATP's and the statement were inadmissible, there is no basis for granting the defendant a new trial. The ATP's and Moultrie's statement related only to Counts 3-29 of the redacted indictment—possession of the ATP's on September 1, 1976, knowing them to be stolen. Most of the Government's evidence at trial—162 of the 235 pages of testimony—related solely to Moultrie's possession and sale of the Luz R. book on August 20, 1976 and the Providencia

[Footnote continued on following page]

POINT II

The Prosecutor Committed No Error In His Rebuttal Summation.

Moultrie claims that the prosecutor, in his rebuttal summation, improperly placed his own integrity and that of the United States Attorney's Office behind the Government's case. This claim is utterly frivolous.

The law, of course, is clear. A prosecutor may not properly convey to the jury his personal belief in the defendant's guilt, *Lawn v. United States*, 355 U.S. 339, 359 n. 15 (1958); *United States v. Grunberger*, 431 F.2d 1062 (2d Cir. 1970), unless the belief is expressly based upon the record. *United States v. Splain*, 545 F.2d 1131, 1135 n.2 (8th Cir. 1976); *United States v. Grunberger*, *supra*, 431 F.2d at 1068. It is likewise improper "to put the prestige of the United States Attorney's office behind the government's case." *United States v. Brawer*, 482 F.2d 117, 134 (2d Cir. 1973), *cert. denied*, 419 U.S. 1051 (1974). See also *United States v. LaSorsa*, 480 F.2d 522, 526 (2d Cir.), *cert. denied*, 414 U.S. 855 (1973); *United States v. Benter*, 457 F.2d 1174, 1176 (2d Cir.), *cert. denied*, 409 U.S. 842 (1972)*

Cruz check on August 24, 1976. The Government's proof with respect to those counts was overwhelming and there was no spillover from the evidence relating to the ATP's that could have prejudiced Moultrie in any way. Therefore, since Moultrie was sentenced concurrently on all counts, the judgment of conviction should nonetheless be affirmed. *United States v. Hanlon*, 548 F.2d 1096, 1099 (2d Cir. 1977); *United States v. Vasquez*, 468 F.2d 565, 566-567 (2d Cir. 1972), *cert. denied*, 410 U.S. 945 (1973); *United States v. Gaines*, 460 F.2d 176, 179-180 (2d Cir. 1972), *cert. denied*, 409 U.S. 883 (1972).

* It is relevant in assessing the effect of remarks in summation to consider the strength of the Government's case. An improper argument is less likely to affect a jury verdict when, as here, the evidence of guilt is overwhelming. *United States v. Splain*, *supra*, 545 F.2d at 1135. See also *United States v. Grunberger*, *supra*, 431 F.2d at 1069.

In this case, Moultrie has not identified a single statement of the prosecutor in either his direct or his rebuttal summation that was improper under any of the cases cited above. The vice of a prosecutor's putting his own integrity or belief in issue is well-illustrated by *United States v. Grunberger, supra*. There the prosecutor stated during his summation:

"I don't know of a case where the evidence has been as strong as it has been in this case to establish the guilt of any defendant."

431 F.2d at 1068. This Court reasoned that the statement

"was not merely an averment of a personal belief in Grunberger's guilt based on the evidence adduced at Grunberger's trial; it was a statement of belief that the jury was expected to understand came from the prosecutor's personal knowledge of, and from the prosecutor's prior experience with, other defendants, and as such he was speaking as an expert based upon matter outside the record."

Ibid. In this case, the prosecutor used the personal pronoun "I" only once in his rebuttal summation. (Tr. 288; App. 47). He never referred to matters that were not in evidence, or urged inferences that could not be drawn from the evidence. He never expressed any personal view at all, much less one based on facts outside the knowledge of the jury. By no stretch of the imagination can any of the prosecutor's remarks identified by Moultrie be construed to put his own credibility or integrity at issue or to suggest that he had any knowledge of the case beyond the facts presented to the jury.

Likewise, Moultrie has not identified any statement of the prosecutor that puts the integrity of the United States Attorney's Office in issue. In all the cases cited by Moultrie, the prosecutor argued that the jury would

have to conclude that the Government, or the prosecutor himself, had manufactured evidence or framed the defendant in order to acquit. *United States v. Brawer, supra*, 482 F.2d at 133, n.25; *United States v. LaSorsa, supra*, 480 F.2d at 526 n.2; *United States v. Benter*, 457 F.2d at 1176. While such arguments are generally improper, they were nonetheless *upheld* in all three cases because the defendants had provoked the remarks by themselves impugning the integrity of the Government during their summations.

Here there is no argument by the prosecutor even remotely similar to those in *Brawer*, *LaSorsa* or *Benter*. The prosecutor used the pronoun "we" to present the position of his client, the United States Government, but the mere use of the pronoun alone does not raise any question of prestige or integrity. He accurately summarized the defense position that "the government witnesses are all lying. This is a frameup." (Tr. 287-88; App. 46-47). But he then explained reasons, based on the evidence, to believe each witness was telling the truth. (Tr. 288-90; App. 47-49). He at no point suggested that the integrity of the Government was at stake; that the Government would not participate in a frameup.

The prosecutor's careful argument is particularly blameless in that, based on defense counsel's summation, a far more vigorous response would have been justified. Defense counsel plainly placed the integrity of the Government at issue in his summation by his implication that the Government had falsely manufactured a case against his client and had suborned perjury. It was precisely this sort of provocation that was held to justify the aggressive rebuttal arguments in *Brawer*, *LaSorsa* and *Benter*. Nonetheless, the prosecutor choose to ignore defense counsel's baseless charges, and Moultrie is ill-positioned now to complain of the entirely proper rebuttal summation.

In short, as this Court has recently observed in rejecting claims similar to those made here, "[d]efendant[s] claims of prosecutorial misconduct are not merely baseless, but reflect on [his] counsel rather than on the United States District [sic] Attorney or his assistants." *United States v. Rodriguez*, Dkt. No. 76-1589, slip op. 3429, 3433 (2d Cir., May 11, 1977).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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